MT LEGISLATIVE HISTORY

Chapter 533 1985

Bill H 541 S _____ Original bill & hist. X C

| H. Committee on Jud | | | S. Committee on Jud | | |
|---|---|---|---|---|---|
| Hearing Date(s) | 1/29 | C | Hearing Date(s) | 2/22 | C |
| | 2/15 | C | | 3/21 | C |
| | 2/16 | C | | 3/25 | C |
| | | C | | | C |
| Date Out | | C | | | C |

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Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

HOUSE BILL NO. 541

INTRODUCED BY DARKO, D. BROWN

IN THE HOUSE

| | |
|---|---|
| January 29, 1985 | Introduced and referred to Committee on Judiciary. |
| February 16, 1985 | Committee recommend bill do pass. Report adopted. |
| | Bill printed and placed on members' desks. |
| February 18, 1985 | Second reading, do pass as amended. |
| February 19, 1985 | Correctly engrossed. |
| February 20, 1985 | Third reading, passed. |
| | Transmitted to Senate. |

IN THE SENATE

| | |
|---|---|
| February 22, 1985 | Introduced and referred to Committee on Judiciary. |
| March 25, 1985 | Committee recommend bill be concurred in as amended. Report adopted. |
| March 28, 1985 | Second reading, concurred in. |
| March 30, 1985 | Third reading, concurred in. Ayes, 49; Noes, 0. |
| | Returned to House with amendments. |

IN THE HOUSE

| | |
|---|---|
| March 30, 1985 | Received from Senate. |

April 8, 1985

Second reading, amendments concurred in.

On motion, rules suspended and bill placed on third reading this day.

Third reading, amendments concurred in.

Sent to enrolling.

Reported correctly enrolled.

HOUSE BILL NO. 541

INTRODUCED BY Darko (by req.)

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A PARTY WHO UNREASONABLY AND VEXATIOUSLY MULTIPLIES LEGAL PROCEEDINGS IS RESPONSIBLE FOR PAYMENT OF INCREASED COURT COSTS, ATTORNEY FEES, AND OTHER EXPENSES AND LOSSES RESULTING FROM SUCH CONDUCT."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Litigant's liability for excess costs. An attorney or party to any court proceeding who, in the determination of the court, unreasonably and vexatiously multiplies the proceedings in any cause and thereby increases any party's court costs, attorney's fees, or other expenses or losses may be required by the court to personally satisfy such additional costs, fees, expenses, or losses.

-End-



INTRODUCED BILL
HB 541

(To be kept current -- post bills when entering being heard or leaving committee.) Form CS-32

STATUS SHEET

FORTY-NINTH LEGISLATIVE SESSION

COMMITTEE ON JUDICIARY

| HOUSE BILL NO. | ENTERED COMM. | DATE CONSIDERED | OUT OF COMM. | DO PASS DATE | DO NOT PASS DATE | DO PASS AS AMEND. DATE | BE CONCURRED IN DATE | BE CONC. IN AS AMENDED DATE | BE NOT CONCURRED IN DATE |
|---|---|---|---|---|---|---|---|---|---|
| HB 520 | 1/28/85 | 2/11/85<br>2/23/85 | 2/23/85 | | | 2/23/85 | | | |
| HB 521 | 1/28/85 | 2/1/85 | 2/20/85 | | 2/1/85 | | | | |
| HB 522 | 1/28/85 | 2/8/85<br>2/14/85 | 2/14/85 | | | 2/14/85 | | | |
| HB 529 | 1/28/85 | 2/11/85<br>2/22/85 | 2/22/85 | | | 2/22/85 | | | |
| HB 528 | 1/28/85 | 2/8/85<br>2/16/85 | 2/16/85 | | 2/16/85 | | | | |
| HB 531 | 1/29/85 | 2/6/85<br>2/8/85 | 2/8/85 | | | 2/8/85 | | | |
| HB 532 | 1/29/85 | 2/6/85<br>2/8/85 | 2/8/85 | 2/8/85 | | | | | |
| HB 533 | 1/29/85 | 2/12/85<br>2/20/85 | 2/23/85 | | 2/20/85 | AS AMENDED | | | |
| HB 536 | 1/29/85 | 2/12/85<br>2/20/85 | 2/23/85 | | 2/20/85 | Re-referred back to Comm. 2-27 | | | |
| HB 541 | 1/29/85 | 2/15/85<br>2/16/85 | 2/16/85 | 2/16/85 | | | | | |
| HB 547 | 1/29/85 | 2/7/85<br>2/8/85 | 2/8/85 | 2/8/85 | | | | | |
| HB 557 | 1/29/85 | 2/13/85 | 2/13/85 | | | 2/13/85 | | | |
| HB 566 | 1/30/85 | 2/8/85<br>2/13/85 | 2/13/85 | (WITHOUT RECOMMENDATION AS AMENDED) | | | | | |
| HB 575 | 1/30/85 | 2/8/85<br>2/11/85 | 2/11/85 | | | 2/11/85 | | | |
| HB 577 | 1/31/85 | 2/15/85<br>2/16/85 | 2/16/85 | | | 2/16/85 | | | |
| HB 585 | 1/31/85 | 2/15/85<br>2/16/85 | 2/16/85 | 2/16/85 | | | | | |

In response to a question asked by Rep. Addy, Mr. Furst stated that the intent of these bills has nothing to do whatsoever with local rates. They are still regulated. The local service rates are going to go up whether this bill is passed or not. He doesn't feel that Mountain Bell would say that they don't intend to raise local rates if this bill passes.

Rep. Keyser asked Cal Simshaw if he has a problem with the time frame pointed out on page 7 of the bill. Mr. Simshaw stated that the commission does not.

Jim Paine, Montana Consumer Counsel, addressed one of Rep. Krueger's questions. He said the counsel is statutorily charged with representing the consumers of the state before the PSC and appropriate courts. Mr. Paine further stated that he supports the bill because he feels something must be done. This bill does not address the problems that are going on nationally -- the forces that are going to cause upward pressure on local exchange rates. There is not much that one is going to be able to do about the competition that is coming. He feels that it is important to allow the existing telephone companies to compete. He feels there are safeguards in the bill.

Following a period of general questioning, hearing closed on HB 380 and HB 577.

CONSIDERATION OF HOUSE BILL NO. 541: Rep. Paula Darko, District #2, testified as HB 541's chief sponsor. She informed the committee that Judge Robert M. Holter from the 19th Judicial District, requested the introduction of HB 541 due to some of the problems he was experiencing as a judge. HB 541 is an act providing that a party who unreasonably and vexatiously multiplies legal proceedings is responsible for payment of increased court costs, attorney fees, and other expenses.

Judge Robert M. Holter, 19th Judicial District, testified in support of the bill. He does not view this bill as an anti-lawyer bill; but rather, he views this as a pro-lawyer bill. He has had problems with pro se appearances, and he has had problems with lawyers who just simply conduct their proceedings by fouls.

Judge Michael Keedy, 11th Judicial District, testified in support of this bill. He pointed out that there is a tempting opportunity in nearly every litigation for a lawyer or his client or party appearing on his own behalf to abuse the judicial process to his or her convenience for tactical reasons or for personal gain or the satisfaction of vengeful motives. This bill would remedy that problem somewhat.

There being no further proponents or opponents, Rep. Darko closed. She said the bill is needed, and it is patterned after federal code.

Chairman Hannah opened the floor up for questions and answers.

Rep. Mercer stated that he feels this bill is needed, but he is concerned about the statute. He feels the language in the title of the bill "multiplies the proceedings" is pretty lose language. Judge Holter said he took this particular language from 28 USCS §1927. He said it just simply means to expand it beyond the normal types of thing that would be done in the presentation of a court case.

In response to a question asked by Rep. Mercer, Judge Holter felt that dismissing a case would be a rather harsh remedy.

In response to a question asked by Rep. Krueger, Judge Holter said that this legislation wouldn't act as a deterrent from preventing cases such as the ones described from being filed; it is a protection for those who have to deal with unreasonable parties in the course of litigation.

There being no further questions, hearing closed on HB 541.

CONSIDERATION OF HOUSE BILL NO. 585: Rep. R. Budd Gould, District #61, chief sponsor of HB 585, testified before the committee. This is an act to revise the sentence review procedure; providing that any interested person may participate in review proceedings.

Judge Michael Keedy, 11th Judicial District from Flathead County, testified as a proponent to HB 585. He mentioned that the Sentence Review Board is really an arm or extension of the Montana Supreme Court. It is a three-member panel of district court judges. These members are appointed on a rotating basis from time to time by the chief justice of the Montana Supreme Court. Judge Michael Keedy pointed out that Senator Bob Brown has introduced SB 150 which would have abolished outright the Sentence Review Board. That is apparently too radical an approach for the tastes of the members of Senate Judiciary Committee who have either killed or tabled the bill. He said that Rep. Gould did agree at Judge Keedy's request to sponsor HB 585. HB 585 is a more modest approach to some of the perceived deficiencies or defects in the procedure under which sentence review now functions. Judge Keedy feels this is a good first step to correcting those problems. It is his feeling that a person who has the ability to further enlighten the board as to a hearing on a particular defendant, should be able to participate in that Sentence Review Board hearing. He further stated that the sentencing judge is in the best position to enlighten the board.

There being no further proponents or opponents, Rep. Gould closed.

The floor was opened up for questioning.

# STANDING COMMITTEE REPORT

February 16 19 85

MR. SPEAKER:

We, your committee on JUDICIARY

having had under consideration HOUSE Bill No. 541

FIRST reading copy ( WHITE color )

PARTY MULTIPLYING LEGAL PROCEEDINGS LIABLE FOR INCREASED COSTS

Respectfully report as follows: That HOUSE Bill No. 541

DO PASS

REP. TOM HANNAH Chairman.

COMMITTEE SECRETARY

STATE PUB. CO.
Helena, Mont.

CHAIRMAN--MAZUREK, JOE SECRETARY-STALEY, CINDY
NORMAL SCHEDULE==> SITE: OLD SUPREME COURT ROOM DAYS: M-TU-W-TH-F TIME: 10:00 A.M.-12 NOON

| BILL NO | REFER DATE | HEARING DATE | CONSIDERATION DATES | COMMITTEE ACTION | REREFERRED TO COMM | DATE OUT |
|---|---|---|---|---|---|---|
| HB0520 | 3/05 | 3/25 | | CONCUR | | 3/28 |
| GRADY, EDWARD J. | | | CLARIFYING PUBLIC DOES NOT HAVE RIGHT TO USE DIVERTED WATER FOR RECREATION | | | |
| HB0522 | 2/21 | 3/07 | | CONCUR AS AMENDED | | 3/7 |
| PECK, RAY | | | PROVIDING NOTICE TO CLAIMANTS OF CERTAIN PROPERTY SUBJECT TO FORFEITURE | | | |
| HB0529 | 3/05 | 3/18 | | CONCUR | | 3/22 |
| ADDY, KELLY | | | WORKERS' COMP. REMEDIES WHEN EMPLOYER IS UNINSURED | | | |
| HB0532 | 2/13 | | | | BUSINESS & LABOR | |
| PISTORIA, PAUL G. | | | LIMITATION ON PENALTIES THAT MAY BE IMPOSED BY A PRIVATE PARKING SERVICE | | | |
| HB0541 | 2/22 | 3/21 | | CONCUR AS AMENDED | | 3/23 |
| DARKO, PAULA A. | | | PARTY MULTIPLYING LEGAL PROCEEDINGS LIABLE FOR INCREASED COSTS | | | |
| HB0547 | 2/13 | 3/11 | | CONCUR | | 3/11 |
| MILES, JOAN | | | REVISION OF LAW ON CERTAIN SEXUAL CRIMES | | | |
| HB0566 | 2/21 | 3/12 | | CONCUR | | 3/12 |
| THOMAS, FRED | | | PROHIBIT INSTALLATION AND USE OF DIAL-UP SECURITY ALARM SYSTEMS | | | |
| HB0575 | 2/16 | 3/25 | | ADVERSE REPORT /as amended | | 3/25 |
| KADAS, MIKE | | | INCREASED PENALTY FOR CERTAIN UNLAWFUL RESTRAINTS OF A CHILD | | | |
| HB0579 | 2/16 | 3/12 | | CONCUR AS AMENDED | | 3/21 |
| WINSLOW, CAL | | | CERTIFICATION FOR VOLUNTARY ADMISSION OF MENTAL PATIENT TO STATE HOSPITAL | | | |
| HB0585 | 2/22 | 3/20 | 3/20 | CONCUR AS AMENDED | | 3/23 |
| GOULD, R. BUDD | | | REVISE SENTENCE REVIEW PROCEDURE | | | |
| HB0586 | 2/19 | 3/20 | | CONCUR | | 3/20 |
| GOULD, R. BUDD | | | CONFISCATE AND DISPOSE OF INMATES' CONTRABAND | | | |

MONTANA STATE SENATE
JUDICIARY COMMITTEE
MINUTES OF THE MEETING

March 21, 1985

The fifty-fourth meeting of the Senate Judiciary Committee was called to order at 10:07 a.m. on March 21, 1985, by Chairman Joe Mazurek in Room 325 of the Capitol Building.

ROLL CALL: All committee members were present.

CONSIDERATION OF HB 609: Representative Jack Ramirez, sponsor of HB 609, testified this bill does not require a whole lot of concern. The National Commission on Uniform Laws recommended this legislation regarding durable powers of attorneys. We have the law on the books already. It is a very important law. This will save the expense of people who have relatives who become incapacitated. With a durable power of attorney, they are able to deal without the tremendous expense of a conservatorship.

PROPONENTS: Doug Olson, of the State of Montana Seniors' Office, presented written testimony in support of the bill (Exhibit 1).

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: None.

CLOSING STATEMENT: Representative Ramirez stated he had some written material from the Commission of Uniform Laws if anyone wanted to see it.

Hearing on HB 609 was closed.

ACTION ON HB 609: Senator Pinsoneault moved HB 609 be recommended BE CONCURRED IN. The motion carried unanimously.

CONSIDERATION OF HB 541: Representative Paula Darko, sponsor of HB 541, testified this bill was submitted at the request of several district court judges (see correspondence regarding bill request, Exhibit 2). What this bill says is any person who multiplies legal proceedings is responsible for the payment of costs. There were questions in the House committee that the court would invoke this reprimand. There is some federal case law cited in the material provided to the committee.

PROPONENTS: None.

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: None.

CLOSING STATEMENT: None.

Hearing on HB 541 was closed.

CONSIDERATION OF HB 594: Representative John Cobb, sponsor of HB 594, testified this is a simple bill. There is a gap in the law. There is no notice requirement here. This came out of the Landlord-Tenant Act. He gave this to the Department of Natural Resources and Conservation before he filed it, and they said they didn't have any problems with the bill.

PROPONENTS: Alan Eck, representing Montana Farm Bureau Federation, presented written testimony in support of the bill (Exhibit 3).

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: None.

CLOSING STATEMENT: None.

Hearing on HB 594 was closed.

CONSIDERATION OF HB 622: Representative Bob Thoft, sponsor of HB 622, testified this is called the bad check bill. Under present law, if a person purchases goods or services and gives that person a check and the check is no good, it is considered a bad check. However, if that person puts those goods on an account and gives the person a bad check as payment on the account, it is not considered a bad check.

PROPONENTS: Riley Johnson, representing the National Federation of Independent Business, testified they feel this bill is a good companion to the bad check in a civil action, but it only provided for the civil remedy for the goods and services. This would provide a second alternative for larger checks and payments on account. It would help the small businesses that have to carry these accounts. Don Ingels, on behalf of Lake Milling Inc. in Hamilton, presented written testimony in support of the bill (Exhibit 4).

OPPONENTS: None.

QUESTIONS FROM THE COMMITTEE: Senator Blaylock asked if they come in and give a check that does not have sufficient funds to cover it, but they have taken the goods because they are on account, would this apply?

# Nineteenth Judicial District

Lincoln County

ROBERT M. HOLTER
DISTRICT JUDGE

March 4, 1985

Representative Paula Darko
House of Representatives
Capitol Station
Helena, Montana 59620

Re: House Bill 541

Dear Paula,

Thank you for the copy of HB 541 as passed by the House.

I have no objection to the amendment of the bill to conform to the U. S. Code section.

One deletion might be significant. The bill you originally purposed contained the item "or losses". The reason for the inclusion of "losses" is that pettifoggery can be used to withhold property from it's rightful owner, or in some way cause a loss to the other party which is not costs, expenses or attorney's fees, and for which no redress is available in the present law.

If the word "losses" was re-instated between costs and expenses, that would be significant.

All of these items, costs, losses, attorney's fees and expenses would have to be proved by the party claiming them before the Court could award them.

In any event "losses" is not worth losing HB 541 over. As passed by the House, HB 541 will correct almost all of the problems that have existed in the past.

Thank you again for your interest in this matter and the great support you have given it.

Very truly yours,

Robert M. Holter
District Judge

RMH:ps

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 032185
BILL NO. HB 541

COURTHOUSE • LIBBY, MONTANA 59923 • PHONE 293-7781

COMMENT

By: Robert M. Holter
District Judge
Libby, Montana 59923
1-406-293-7781

HB 541

The Bill as introduced reads:

> A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A PARTY WHO UNREASONABLY AND VEXATIOUSLY MULTIPLIES LEGAL PROCEEDINGS IS RESPONSIBLE FOR PAYMENT OF INCREASED COURT COSTS, ATTORNEY FEES, AND OTHER EXPENSES AND LOSSES RESULTING FROM SUCH CONDUCT."
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
>
> Section 1. Litigant's liability for excess costs. An attorney or party to any court proceeding who, in the determination of the court, unreasonably and vexatiously multiplies the proceedings in any cause and thereby increases any party's court costs, attorney's fees, or other expense or losses may be required by the court to personally satisfy such additional costs, fees, expenses, or losses.

The source of this bill is 28USCS §1927, which reads:

> Counsel's liability for excessive costs
>
> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.
> (June 25, 1948, c.646, §1, 62 Stat. 957.)

There are some changes in HB 541 from the Federal statute. These were done to clearly cover the pro se litigant as well as attorneys. Further, HB 541 clearly sets out which damages can be awarded. "Costs" in Montana has been narrowly construed to mean filing fees and other statutory fees paid by a litigant. Attorney's fees, expenses, other expenses and losses makes it clear that the wronged litigant will be made whole.

As I told the committee, I do not regard this an "anti-lawyer" bill. What HB 541 does is protect the good lawyer and his client from the pettifogger.

SENATE JUDICIARY COMMITTEE
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At present there is no practical method of redress to a person who is the victim of vexatious and harassing conduct by the other party. The three usual routes are:

(1) Contempt. This is an inherent power of the court. It may be used to punish wrongdoers but does not restore the victim.

(2) Malicious prosecution. This is only available if the whole action is malicious and must be brought as a separate action.

(3) Abuse of Process. This is a narrow action which only contemplates misusing court process. The process was issued rightfully but misused.

There was concern at the committee hearing that the very presence of this statute would only increase the evil it was designed to cure. In other words, in every case where a lawyer didn't like what the other was doing, he would claim the other party was harassing him. Be assured that before any damages could be awarded under this statute, the court must hear facts and make a determination the conduct was "vexatious and harassing". That requires proof which is highly evident. In attachment "A", I have included 12 American Law Reports, Federal (ALR Fed.) pages 910 to 916. They contain several instances of use to award losses; but at pages 914 and 915 appear clear showings of when the statute is not applicable.

Attached hereto are the following:

Attachment A. 12 ALR Fed pages 910 to 916, noted above.

Attachment B. 42 State Reporter 173. This very recent case shows the magnitude of the problem of pro se litigants lashing out recklessly against public officials. If a public official is sued by these tactics, HB 541 will afford that official relief from personal expense. The case noted does not show the basis of the Supreme Court's award of fees.

Attachment C. 41 State Reporter 1879. In is case, disqualification was used oppressively for ulterior purposes. The Supreme Court did not sustain the award of attorney's fees or fine because the court rule on disqualification does not authorize fees, but otherwise sustained the trial judge. It is hard to determine the distinction between B and C, which points the need for HB 541.

Attachment D. A portion of page 9 of the Daily Missoulian for January 30, 1985. The willingness of Lance to embroil anyone in sight in litigation deserves to be at his own expense.

SENATE JUDICIARY COMMITTEE
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In conclusion, I would urge the enactment of HB 541. I do not contemplate it will be something used in the everyday conduct of court affairs. In may own career, I can recall but one instance in 22 years as a practicing attorney when it would have been applicable. As a Judge of about 8 years, I have come across six to eight instances where it might have applied. I can state without reservation that in each of those six to eight instances, a party innocent of any wrongdoing, such as Mrs. Gahr, was financially hurt by the vexatious and harassing tactics of the other side.

If a party decides to conduct their courtroom "ballgame" by intentional fouls, the court cannot award "free throws". But the court, if HB 541 is enacted, can restore the victim's monetary losses.

Respectfully submitted,

Robert M. Holter
District Judge

SENATE JUDICIARY COMMITTEE
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stated the rules don't address participation. You get notice and can show up, but may not be able to participate. Senator Towe moved as a substitute motion to delete all of the new material added in subsection 3. Senator Blaylock moved as a substitute motion that HB 585 be recommended BE NOT CONCURRED IN. The motion failed with Senators Blaylock and Daniels voting in favor. The committee then reverted to Senator Towe's motion to amend. The motion carried unanimously. Senator Towe asked if the committee needed to address the question about any other interested person. Mr. Petesch responded the way he read the phrase, the rules provide anyone who asks for notice is entitled to it, so anyone who writes will get notice. Senator Mazurek asked about the person who wants to show up at every hearing. Senator Galt responded they said the chairman of the Sentence Review Division could control that. Senator Towe moved HB 585 be recommended BE CONCURRED IN AS AMENDED. The motion carried with Senators Blaylock, Daniels, and Yellowtail voting in opposition.

ACTION ON HB 541: Proposed amendments were distributed to the committee (Exhibit 3). Senator Daniels moved adoption of the amendments. Mr. Petesch explained the reason for striking "so" is because it is not grammatical. The research of loss was suggested by Judge Holter. Senator Mazurek asked if that were consistent with the federal statute. Mr. Petesch replied no, and neither is the bill before the committee. The federal act only applies to an attorney. Senator Towe stated by rejecting losses, you are broadening that considerably. Senator Towe moved as a substitute motion that amendment No. 1 be adopted. The motion carried unanimously. Senator Towe moved HB 541 be recommended BE CONCURRED IN AS AMENDED. Senator Yellowtail asked if federal law said any attorney. Mr. Petesch responded any attorney or person to conduct cases. Senator Towe said what they wanted to get at is the person representing himself pro se. The motion carried unanimously.

ACTION ON HB 354: Senator Brown moved HB 354 be recommended BE CONCURRED IN. It was presented to the committee the statute has been on the books for 40 years and there was never a request by the airports or the pilots to review it. Because of the Seeley Lake dispute, there is a request that all of them be licensed. This will create a hardship for them. They intend to continue the investigation on Seeley Lake in any event. It has been on the books for 40 years and was never used and must not be needed. Senator Pinsoneault asked if this law in any way gave you the authority to go between the adversaries and smooth the waters. Senator Mazurek responded this would probably cut off that suit. What do they think this bill will do to them? Will they be able to shut that airport down? Mr. Gysler responded basically, the homeowners filed suit two years ago with the intention of having the airport shut down because no hearings were held. The Department of Commerce has

Annotation

# CONSTRUCTION AND APPLICATION OF 28 USCS § 1927 AUTHORIZING IMPOSITION OF LIABILITY FOR EXCESS COSTS ON COUNSEL WHO MULTIPLIES THE PROCEEDINGS UNREASONABLY AND VEXATIOUSLY

by

*Walter W. Jones, Jr., J.D.*

This annotation collects and analyzes the federal cases which construe and apply 28 USCS § 1927[1] authorizing imposition of liability for excess costs[2] upon counsel, personally,[3] who multiplies the proceedings

1. 28 USCS § 1927 is based on former 28 USCS § 829 (RS § 982) and has had substantially similar wording throughout its history. Because of the substantial similarity between the present statute and its predecessor, cases decided under the predecessor statute are included herein.

2. Rule 54(d) of the Federal Rules of Civil Procedure provides, in pertinent part, that except when express provision therefor is made either in a statute of the United States or in these Rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. Section 1927 thus represents one exception to this Rule.

3. The predecessor of 28 USCS § 1927 provided only that an attorney was to be required to satisfy excess costs, and the word "personally" was inserted in the present statute upon the authority of Motion Picture Patents Co. v Steiner (1912, CA2 NY) 201 F 63 according to the historical note to the statute as found in the United States Code Service.

## Total Client-Service Library® References

20 Am Jur 2d, Costs § 30

7 Am Jur Pl & Pr Forms (Rev ed), Costs, Forms 96, 109; 11 Am Jur Pl & Pr Forms (Rev ed), Federal Practice and Procedure, Forms 1791–1794

ALR Digests, Attorneys § 32, Costs and Fees § 25

US L Ed Digest, Attorneys § 13, Costs and Fees §§ 1, 25, 28

ALR Quick Index, Attorneys' Cost or Expense

Federal Quick Index, Attorneys' Costs



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unreasonably and vexatiously. The full text of 28 USCS § 1927 reads as follows:

**§ 1927. Counsel's liability for excessive costs.**

*Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case as to increase costs unreasonably and vexatiously may be required by the court to satisfy personally such excess costs.*

In the following cases, where, under § 1927 or the predecessor statute, costs resulting from attorney's unreasonable and vexatious prolongation of proceedings were sought from the attorneys responsible for the unjustifiable delays, the courts have held that, under the particular circumstances involved, such attorneys were personally liable for the excess expenses.

Thus affirming the judgment entered for the plaintiff after the second trial of her cause, the court in Kiefel v Las Vegas Hacienda, Inc. (1968, CA7 Ill) 404 F2d 1163, 13 ALR Fed 895, cert den 395 US 908, 23 L Ed 2d 221, 89 S Ct 1750, reh den 395 US 987, 23 L Ed 2d 776, 89 S Ct 2128, ordering that defendant's attorney have imposed upon him personally, under § 1927, certain costs resulting from the misconduct of the attorney, held that the power of the courts to impose such excess costs personally on attorneys should be exercised only in instances of a serious and studied disregard for the orderly processes of justice, and that the attorney's conduct was clearly within the restrictive standards of § 1927. The plaintiff sued a Las Vegas hotel in tort and breach of contract for personal injuries suffered when an unknown assailant broke into her hotel room and struck her with a bottle of champagne. The trial judge granted her motion for a new trial, after the jury in the first trial returned a verdict for the defendant, saying that it was convinced that the plaintiff had not had a fair trial because of the unprofessional conduct of defendant's attorney. The second trial resulted in a jury verdict for the plaintiff. After the conclusion of the first trial, the plaintiff filed a successful motion in the trial court to assess costs and attorney's fees against the defendant and defendant's attorney, jointly and severally, from which the defendant and the defendant's attorney appealed. As to this appeal, the court pointed out that the specific items taxable as costs were limited by the express language of § 1927, that § 1927 relieved the defendant hotel of any responsibility for costs assessed by the trial judge, and that any costs assessed were taxable to the attorney personally. The court noted that during the first trial, the defendant's attorney had engaged in much professional misconduct, specifically including using harassing and obstructionist tactics in pretrial proceedings; that during the second trial, the attorney not satisfied with the lesson he should have learned from the outcome of the first trial, drew a reprimand from the trial judge for, among other things, seeking numerous postponements of the second trial and then appearing on the date specifically set asking for a stay due to the appeal on the plaintiff's motion for assessment of costs, which the attorney had been preparing all along but of which he had never notified the trial court, and that the attorney in previous cases had engaged in quite similar opprobrious conduct, including repeatedly making known meritless objections both in the trial



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and in the pretrial phases of the cases for the purpose of harassment. Asserting that there could be no doubt that the attorney was aware that his conduct could lead to an assessment of costs against him in view of the fact that in Ryan v Monson (1961) 33 Ill App 2d 406, 179 NE2d 449, —a case in which he had been criticized by the Illinois Appellate Court for unprofessional conduct—a remand was had for that very purpose, the court ordered that the District Court assess against the attorney personally, under § 1927, the expenses of printing the plaintiff's 54-page brief and the additional appendix in the present action, and a sum no greater than one-third of the plaintiff's attorneys' fees incurred in both the appeal of the two jury trials and the present appeal from the order assessing costs against him.

☆ COMMENT: Pursuant to the mandate of the Court of Appeals in the Kiefel Case, supra, the District Court entered a judgment against the attorney for $4,000 "as and for one-third of the appeal attorneys' fees." On appeal this judgment was upheld by the Court of Appeals, and a petition for certiorari was once again denied by the Supreme Court in Hubbard v Kiefel (1971) 402 US 930, 28 L Ed 2d 864, 91 S Ct 1527.

Where a portion of the findings of the District Court in a suit to enjoin patent infringement recited that the defendant's counsel, in the taking of certain depositions, excessively cross-examined two of the plaintiff's witnesses, unwarrantably instructed another witness not to answer proper questions put to him on direct examination, and thus increased the plaintiff's cost unreasonably and vexatiously, rendering his attempt to take the deposition futile and ineffective, and that counsel's conduct in this regard was obnexious to the orderly, reasonable, and proper conduct of an examination, the court in Toledo Metal Wheel Co. v Foyer Bros. & Co. (1915, CA6 Ohio) 223 F 350, held that the trial court's order to counsel, which was presumably made pursuant to the predecessor statute and which apparently instructed him not to engage in such behavior further, was manifestly made to shield the plaintiff from excessive costs, and must therefore be sustained. Entering an order, not expressly based upon the predecessor statute, that the plaintiff pay all costs except those portions of such costs in terms imposed upon counsel, the court additionally noted that the power of the courts to protect a litigant against costs so created by his counsel would exist independently of the predecessor statute inasmuch as the rule at common law was broad enough to redress such a matter through summary proceedings.

See Weiss v United States (1955, CA2 NY) 227 F2d 72, cert den 350 US 936, 100 L Ed 817, 76 S Ct 308, reh den 350 US 977, 100 L Ed 847, 76 S Ct 431, an action representing the fourth attempt to collect the proceeds of two life insurance policies, wherein the court, pointing out that the plaintiff beneficiary's arguments had been unacceptable in the first action, that the second and third unsuccessful actions were only slight variations from the original thesis, and that the present action was based on some alleged further variation in theory so slight as to be perceived only with difficulty, warned that further vexatious litigation to reopen the "hopeless" case would subject the attorney personally to the costs there-



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of as provided in § 1927, affirming the summary judgment entered against the plaintiff in the court below.

The courts in the following cases have held that, under the particular circumstances, attorneys alleged to have unreasonably and vexatiously multiplied proceedings could not, under § 1927 or its predecessor statute, be held personally liable for the excess costs occasioned by the delay.

Where the defendant, in the trial court, objected to certain proceedings on limitation by the plaintiff on the ground that the plaintiff's bill was vitally defective and where the defendant alleged that the plaintiff nevertheless proceeded in taking testimony which put the defendant to considerable expense in attending, preparing for, and cross-examining a witness, the court in Motion Picture Patents Co. v Steiner (1912, CA2 NY) 201 F 63, in connection with its ruling that the predecessor statute did not authorize the trial judge to insert an arbitrary sum in the judgment to be paid by the plaintiff to the defendant, thus reforming the decree of the trial judge in allowing defendant $300 as excess costs and expenses while otherwise affirming the judgment below, held that there was nothing in the record to show that the plaintiff's attorney had unnecessarily multiplied the proceedings or added improperly to the costs since there was neither a statement of the amount of the costs nor indication that the amount of the alleged increase was occasioned by the misconduct of the plaintiff's attorney. The court said that the predecessor statute applied only to the attorney, proctor, or other person admitted to practice in the federal courts, that it could be invoked only when such attorney, proctor, or other person multiplied the proceedings in the cause so as to increase costs unreasonably and vexatiously; that although the attorney's conduct might be so contumacious as to justify proceedings for contempt, he could not be punished under the predecessor statute unless he had increased the costs and had done so unreasonably and vexatiously; and that the court could not direct the offending attorney to pay all the costs, but only the excess of costs which excess was occasioned by his unreasonable and vexatious conduct. The court further said that the predecessor statute did not apply to the client, no matter how reprehensible his conduct might be, and that it was designed to punish the pettifogger, or at least to make him pay the expenses occasioned by his misconduct.

In Brislin v Killanna Holding Corp. (1936, CA2 NY) 85 F2d 667, the court, holding that the trial judge had not improperly refused to award costs against an attorney personally, under the predecessor statute, despite the inordinate length of the record on the rehearing of an involuntary petition in bankruptcy, observed that it was a matter peculiarly for the discretion of the trial judge to determine to what extent an attorney before him had vexatiously and unreasonably increased costs by multiplying the proceedings.

Where the debtor in a petition for voluntary reorganization under the Bankruptcy Act sought to have taxed as costs against certain creditors or their attorney a docket fee and stenographic costs, and sought an additional allowance under the predecessor statute to cover expenses



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incurred by the debtor in opposing the creditor's overruled objections, the court in Re Realty Associates Secur. Corp. (1943, DC NY) 53 F Supp 1013, denying the request for the additional allowance, held that the predecessor statute neither created any penalty in favor of the prevailing party nor sanctioned the taxing of any additions over regular costs.

See West Virginia v Chas. Pfizer & Co. (1971, CA2 NY) 440 F2d 1079, cert den 404 US 871, 30 L Ed 2d 115, 92 S Ct 81, where, in a class action to recover treble damages under the antitrust laws, the court, noting that § 1927 provided that a court could award costs in cases of frivolous and vexatious appeals, said that the imposition of such sanctions was highly unusual and required a clear showing of bad faith, of which there was insufficient evidence in the record.

See also Gamble v Pope & Talbot, Inc. (1962, CA3 Pa) 307 F2d 729, cert den 371 US 888, 9 L Ed 2d 123, 83 S Ct 187, a case involving an appeal by counsel for defendant, in an action to recover for personal injuries, taken after the District Judge imposed a fine upon counsel, payable to the United States, for his unintentional 10-month delay in filing a pretrial memorandum, the delay violating a standing order of the District Court for the Eastern District of Pennsylvania permitting the imposition of sanctions, including fines, against counsel who failed to appear at a pretrial conference, or to participate therein or prepare therefor, wherein the Court of Appeals, in connection with its holding that there was nothing in the Federal Rules of Criminal Procedure which authorized sanctions in the form of penalties to be imposed upon an attorney in a civil litigation, remarked that while the District Judge justified the imposition of the fine by saying that the time of judicial employees was wasted by counsel's oversight, this was of no moment in determining cost under § 1927, that § 1927 was applicable only when excess costs were shown to exist, and that the costs were not payable to the United States as a fine but might be payable to the United States as a party litigant whose costs were increased by virtue of the attorney's conduct.

See further, Miles v Dickson (1967, CA5 Ala) 387 F2d 716, wherein the court, although remarking that the trial judge was correct in concluding that there was no genuine issue as to any material fact, said that it was convinced that the plaintiffs' attorneys acted in good faith upon written authorization from their clients, that it was not determining whether the District Judge had power, either inherently or under § 1927, to require the plaintiffs' attorneys personally to pay the court costs, but that it simply held that the facts and circumstances did not present such an extreme case as would permit the court to tax the costs against the attorneys, accordingly reversing that part of the judgment below which taxed costs against the attorneys and otherwise affirming the entering of summary judgment for the defendants.

And, finally, see Coyne & Delany Co. v G. W. Onthank Co. (1950, DC Iowa) 10 FRD 435, wherein the court, overruling the defendants' motion under § 1927 to protect them against the costs of preparation to defend those claims on which the plain-



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fits alleged infringements of patents, but which upon the trial of the cause, the plaintiffs might abandon so far as proof or attempted proof by evidence was concerned, said that to grant the motion at that stage of the proceedings would in effect amount to a predetermination of liability under § 1927 and would clearly constitute an abuse of judicial discretion that attorneys in good standing were presumed to be acting in good faith and with no intent to knowingly and deliberately increase the costs in any litigation unless and until the contrary was clearly shown; and that whether costs should or should not be taxed as provided for in § 1927 would be determined upon proper motion at the time of the final submission of the cause.

The court in the following case held that § 1927 did not authorize the imposition of excess costs for unreasonable and vexatious multiplication of proceedings upon one who had at all times appeared in court in his own behalf, without counsel.

Thus, where, in relation to a series of actions on a promissory note and for specific performance or foreclosure of a land contract, the seller sought, by motion, under § 1927, to impose upon the buyer, who at all times had conducted the actions on his own behalf, without counsel, "special costs" for fees and disbursements of the seller's attorney, the court in 1507 Corp. v Henderson (1971, CA7 Wis) 447 F2d 540, agreeing with the conclusion of the District Court that § 1927 did not authorize ordering recovery of costs from a party, not only from an attorney or an otherwise admitted representative of a party, held that § 1927 did not deal with the question of the nature or amount of costs to be allowed, but authorized imposition of otherwise allowable costs on counsel personally in place of the party for whom he had appeared where the circumstances mentioned in the section had occurred. Various lawsuits had been commenced in the District Court with respect to the land contract and promissory note, and while these actions were pending, the buyer had raised the subject matter of these earlier actions in pleadings filed in three other courts of original jurisdiction and in two courts of appeal. About half of the amount sought under § 1927 was allegedly incurred in defending the seller against the claims raised in these multiplicitous actions, while the other half of the fees and expenses sought were allegedly incurred in proceedings to collect the seller's judgment against the buyer, made necessary by the buyer's unreasonable and vexatious conduct in an effort to avoid collection. However, the court noted that although the District Court had found § 1927 inapplicable, the court had also found that the buyer had in fact multiplied the proceedings, that his conduct had been unreasonable and vexatious, and that the court had remarked that if it were within the court's statutory power to grant the special costs sought, it would certainly have done so.

The reader may find the following annotations to be of related interest:

Attorney's right to practice in federal court as affected by his disbarment or suspension in state court or other federal court. 20 L Ed 2d 1436.

Misconduct other than criminal as ground for disbarment or suspension



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of attorney from practicing in federal court or before federal administrative agencies. 94 L Ed 130, 3 L Ed 2d 1960.

Fabrication or suppression of evidence as ground of disciplinary action against attorney. 40 ALR3d 169.

Consult POCKET PART in this volume for later cases and statutory changes



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STATE REPORTER
Box 749
Helena, Montana 59624

VOLUME 42

No. 84-410

Attachment 13

RICHARD C. LUSSY,

Plaintiff and Appellant,

v.

J. MICHAEL YOUNG,

Defendant and Respondent.

---

OPINION, ORDER AND JUDGMENT

---

Richard C. Lussy appeals from an order of the District Court, Third Judicial District, Deer Lodge County, the Hon. Henry Loble presiding, from an order dismissing Lussy's complaint against J. Michael Young.

The only issue on appeal is the propriety of the District Court's dismissal of Lussy's complaint against J. Michael Young.

In cause no. DV-84-72 in the same District Court, Richard C. Lussy sued John Conway Harrison, John C. Sheehy, Fred J. Weber and L.C. Gulbrandson as individuals, without reference to their judicial positions, in a complaint filed in Deer Lodge County. J. Michael Young, a state employee, appeared as attorney for the named individual defendants in that action and brought about an order of the District Court to dismiss the action against the said individuals.

Lussy then sued J. Michael Young in the District Court, Deer Lodge County in cause no. DV-84-93, on the grounds that Young had represented the individuals in the action, that this was improper and that he was guilty of conspiracy, improper official actions, and abuse of the principle of "justinhoard."

In the District Court, Judge Loble dismissed the complaint against Young, saying in his order of August 22, 1984:

"The gist of plaintiff's rambling, uncomprehensible complaint seems to be that the defendant represented private, non-governmental clients in his capacity as an employee of state government. However, plaintiff attached to his complaint a motion to dismiss in Cause No. DV-84-72 in the District Court of Deer Lodge County. The defendants of that action were four Montana State Supreme Court Justices. The defendant in this case acted as lawyer for the defendant justices in the earlier action. Mr. Young clearly defended the action against the



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justices on the basis that they were being sued for an act in discharge of a duty associated with judicial actions of the Court. An allegation that Young represented the justices as private individuals when the attached exhibits showed he represented them in their judicial capacities sets forth no cause of action."

Although four justices on this Court are indirectly involved in this action in that the attorney J. Michael Young, had represented them, and is now being sued for that representation, we see no conflict of interest in recognizing in Lussy's present complaint and appeal a fruitless, weightless, needless, senseless action. The appeal, as was the action in the District Court, is frivolous and as such should be dismissed.

This cause is another of a series of proceedings brought by Lussy in both state and federal courts in which he has imputed incompetence, bias and conspiracy against judges and parties involved in his actions, and he has subjected the judicial process to denigration.

IT IS THEREFORE ORDERED:

1. The appeal of Richard C. Lussy from the judgment of dismissal of cause no. DV-84-93, in the District Court, Deer Lodge County, be and the same is hereby dismissed.

2. Richard C. Lussy is assessed costs in the sum of $250.00 payable to the Clerk of this Court for deposit in the State Treasury of the State of Montana as part reimbursement to the State for the unnecessary expense and time he has taken of state officials.

3. The Clerk of this Court is directed to mail a certified copy of this Order to the Clerk of the District Court in and for the Third Judicial District, Deer Lodge County. Such copy of this order and judgment shall be and serve the office of a judgment for costs against Richard C. Lussy and entitled to all of the lien protection of a judgment. Such judgment shall be docketed in the District Court under the cause file number from which the appeal arose.

4. Copy to counsel of record, and to Richard C. Lussy.

DATED this 24th day of January, 1985.

J.A. Turnage, Chief Justice
John Conway Harrison, Justice
John C. Sheehy, Justice
Fred J. Weber, Justice
Willi[illegible] E. Hunt, Sr., Justice
L.C. Gulbrandson, Justice

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STATE REPORTER
Box 749
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VOLUME 41

Attachment C

No. 84-69

IN RE THE MARRIAGE OF

GERALD LAWRENCE GAHR,

Petitioner and Appellant,

v.

LUCINDA GAHR,

Respondent and Respondent.

Submitted: Jul. 17, 1984
Decided: Oct. 11, 1984

JUDGES, Action in a custody proceeding to disqualify the sitting judge for bias. The Supreme Court ruled: (1) An affidavit, standing alone, is not sufficient to disqualify a judge for bias. The movant must satisfy the burden of proof by raising a strong presumption of actual bias, and (2) Attorney fees to a party and damages to a non-party were improperly awarded.

Appeal from the Eleventh Judicial District Court, Flathead County, Hon. Robert M. Holter, Judge

For Appellant: Hash, Jellison, O'Brien & Bartlett, Kalispell

For Respondent: Robert B. Allison, Kalispell

Submitted on briefs.

Opinion by Justice Gulbrandson; Chief Justice Haswell and Justices Harrison, Weber and Sheehy concur.

Affirmed in part, reversed in part.

____Mont.____

____P.2d____

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BILL NO. HB 541

JUDICIARY COMMITTEE
EXHIBIT NO. 2
DATE 032185
BILL NO. HB541

Gahr, Petitioner and Appellant, v. Gahr, Respondent and Respondent.
41 St. Rep. 1879

Mr. Justice Gulbrandson delivered the Opinion of the Court.

This is an appeal from an order of the District Court of the Eleventh Judicial District, Kalispell, Montana, denying petitioner's motion for disqualification of the trial judge for bias, and assessing costs and attorney fees. Respondent did not file a brief with this Court. We affirm in part and reverse in part.

On August 31, 1983, Gerald Lawrence Gahr filed a petition for dissolution and custody. He alleged that he and his wife, Lucinda, and their three children had just returned from a five-year residence in Canada, and that he feared that Lucinda was planning to take the children back to Canada. At the time Gerald filed his petition and affidavit, Lucinda was away visiting relatives in Swan Lake, Montana. Due to this, petitioner alleged he had custody of the children, and requested an order protecting that status.

That same day, Judge Keedy, the District Court Judge assigned to the matter, issued a temporary restraining order, temporary custody order and order to show cause, directing that Gerald Gahr should have temporary custody, and for both to appear for a hearing on September 8, 1983. The temporary order included a provision, as provided for by the local district court rules, that the petition for dissolution could not be dismissed without permission of the court and also directed the Flathead County Family Court Services to prepare a report on custody, support, and other matters.

The next day, September 1, Lucinda Gahr filed a special appearance motion contesting the court's jurisdiction, and also filed affidavits alleging that she, Gerald and the three children had come to Montana on August 9, 1983, to visit relatives in Flathead County, and had planned to return to Canada at the end of the month. She requested custody of the children.

At the time the action was initiated, Lucinda was 31 years old, and Gerald was 60 years old. He was in poor health. Gerald, Lucinda, and the children are all United States citizens.

At a meeting with counsel in chambers prior to the September 8 hearing, Judge Keedy indicated that he was concerned about the question of jurisdiction. After hearing both sides, he decided that he did not have jurisdiction. He then dismissed the portion of the petition pertaining to custody, and ordered Gerald Gahr to deliver the children to Lucinda so she could take them back to Canada. Neither party was given the opportunity to present any evidence of the merits of temporary custody. That same day, Gerald Gahr filed a notice of dismissal without obtaining the permission of the court.

On September 9, Judge Keedy entered findings and conclusions, and an order denying Gerald Gahr's notice of dismissal, and pursuant to the interim report filed by the Family Court Services, directed him to deliver the children to their mother by 4:30 p.m. September 15.

On September 12, Gerald Gahr filed a motion to substitution of

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judge. It was denied the next day as not timely. Then on September 15, just prior to the time delivery of the children had been ordered to take place, Gerald Gahr filed, in quick succession, a motion to amend and a motion to stay. Judge Keedy indicated that he would deny both. Finally, just minutes before the children were to be delivered to Lucinda Gahr, Gerald filed an affidavit of disqualification for bias. Judge Keedy honored the affidavit to the extent of taking no further action on the case other than notifying the Chief Justice of the Supreme Court, for the purpose of calling in a judge to hear the disqualification for bias. Nonetheless, the children were, pursuant to the earlier order, delivered to Lucinda Gahr, and were promptly removed to Canada.

Judge Holter heard the disqualification proceeding. He entered findings and conclusions to the effect that the affidavit was without merit and intended to delay, and granted attorneys fees of $500 to Lucinda Gahr, and damages of $500 to Flathead County.

Appellant presents the following issues on appeal:

(1) Under the rule on disqualification, is the affiant required to present evidence of actual prejudice or bias on the part of the judge?

(2) Was the affidavit in this case sufficient?

(3) If evidence is required in a disqualification proceeding, is it reversible error for the hearing judge to make findings on material facts where there is no evidence to support the findings made?

(4) May the judge hearing a disqualification proceeding award a specific amount of attorney's fees, or attorney's fees at all, to a party or award damages in a specific amount to a non-party without any supporting evidence?

This Court, by order of June 29, 1981, superseded the prior Montana rule on the disqualification of judges. The new order was adopted to remedy the confusion caused by the prior rules. See Supreme Court Order of December 29, 1976, section 3-1-801, MCA (1979), and State ex rel Amsterdam v. District Court (1973),163 Mont. 182, 516 P.2d 378; State ex rel Ross v. District Court (1967), 150 Mont. 233, 433 P.2d 778; State ex rel Grogan v. District Court (1911), 44 Mont. 72, 119 P. 174; State ex rel Carleton v. District Court (1905), 33 Mont. 138, 82 P. 789.

The present scheme, as set forth in section 3-1-802, MCA (1983), is simple: (1) No judge who is a party, related to a party, or who has been an attorney or counsel in the action, may preside over it. (2) In District Court proceedings, each party in a civil case has two, and the state and the defendant in a criminal case each have one, peremptory challenge(s). The peremptory challenge is automatic if it is made within 10 days of when a judge is assigned to a case. The challenged judge then has no further power to act in the action other than to call in another judge. (3) In all judicial proceedings, a judge may be disqualified for actual bias on the filing of an

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affidavit supporting that allegation. Upon receipt of such an affidavit, the presiding judge may do no more than to refer the matter to the Chief Justice, who, if the affidavit warrants an inquiry, will appoint another judge to hear the matter. At the hearing the judge must hear evidence supporting the allegation of bias. The disqualification for bias provision is not meant to be an additional peremptory challenge. It only applies when the moving party meets its burden of raising a strong presumption of actual bias. 46 Am.Jur.2d Judges, Sect. 219.

Appellant, in his first specification of error, points out the general rule under the former substitution provision: that proof of facts showing actual bias and prejudice is not required or permitted, citing Amsterdam, Ross, Grogan, and Carleton. These cases no longer apply under the present version of section 3-1-802, MCA.

Appellant next contends that the affidavit he filed was sufficient to support the disqualification of Judge Keedy. His counsel stated at the disqualification hearing that "[w]e had the feeling that the affidavit would have to stand by itself, and we don't have any further evidence to present." Under the present rule, an affidavit alone cannot support a disqualification for bias. Again, this is different from the old rule. The purpose of the affidavit under the present scheme is to (1) temporarily relieve the sitting judge of any further jurisdiction over the matter; and (2) put the Chief Justice on inquiry notice that a sitting judge may be biased in a particular action. If the Chief Justice feels the affidavit warrants inquiry, he will appoint another judge to hear evidence and look into the matter further.

Appellant next asserts that, in any event, Judge Holter based his ruling on evidence that was not presented in the affidavit or at the hearing. He particularly objects to the judge's finding that: "[a]pparently Judge Keedy determined that false representation had been made to him," and that Judge Keedy "took steps to restore the harm done by a temporary order gained by misrepresentations to him."

It is axiomatic that a judge may take notice of all the evidence properly before him, including that contained in the record. Rule 202(b)(6), Mont.R.Evid. We do not, however, reach the issue of whether a judge sitting in a disqualification hearing can consider the judicial acts committed by the challenged judge. We affirm Judge Holter on the ground that petitioner failed to meet his burden of raising a strong presumption of Judge Keedy's bias. The whole gist of petitioner's argument was that he felt he could not get fair treatment from Judge Keedy because he had denied several of petitioner's previous motions. Beyond a brief chronology of the case and this conclusory argument, petitioner failed to present any evidence to meet his burden. Judge Holter properly denied petitioner's request for the disqualification of Judge Keedy.

Judge Holter awarded $500 in attorney's fees to Lucinda Gahr, and $500 to Flathead County for "damages" for the Family Court Services report. There is no provision in section 3-1-802, MCA that allows a

judge to award attorney's fees to a party, or damages to a non-party, in a disqualification action. This Court has consistently held that, unless a statute provides explicitly for an award of attorney's fees to the prevailing party, a court cannot make such an award. Winer M.D. v. Jonal Co. (1976), 169 Mont. 247, 545 P.2d 1094; Stalcup v. Montana Trailer Sales (1966), 146 Mont. 494, 409 P.2d 542. Judge Holter's order, to the extent that it awards costs to Lucinda Gahr and damages to Flathead County, is thereby reversed.

Affirmed in part, reversed in part.

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DATE 032185
BILL NO. HB 541

# Witness recalls Lance's threat

By LARRY HOWELL
of the Missoulian

A nationally known expert on constitutional law testified Tuesday that he thought John Fesler Lance was serious about taking a hostage if he didn't win back custody of the children and ranch he'd lost through divorce.

Lance, a strong critic of the state's judicial system since his contested divorce settlement in 1979, is on trial in Missoula District Court for felony intimidation. He is acting as his own lawyer.

The charge stems from a letter dated Sept. 8, 1984, he sent to several people hinting that his legal problems would culminate in a "streets of Dodge" showdown, during which he would have an unnamed hostage.

Nathaniel Denman, of Cape Cod, Mass., said he'd agreed last spring to help Lance represent himself in his lawsuit-strewn quest to get back his children and ranch in the Bitterroot. Denman, who was recently on "60 Minutes," said his relationship with Lance deteriorated, culminating when Denman notified authorities of the hostage threat in September.

"I feared he would do what he said he was going to do," Denman testified. "I'm not a psychiatrist, but it looked like he was getting further and further into a hole ... he couldn't get out of."

During his cross-examination, Lance asked Denman if there was "ever any reference to use of firearms ... by John Lance" during their phone conversations. Denman, who said he'd tried to discourage Lance from making any threats, said Lance had made such a reference.

"I mentioned that some policeman or sheriff might come for you and you indicated you had a 7mm (weapon)," Denman said. "You indicated you kept it by the door and you indicated that was what it was for."

After County Attorney Robert L. Deschamps III rested his case, Lance recalled Denman as his own witness. Much of the questioning concerned the falling out between Lance and Denman. After an objection by Deschamps that such testimony was irrelevent, Lance said he hoped to show that the threats had resulted from "the tremendous frustrations building inside of me" over Denman reneging on his offer to help Lance with his legal cases.

Judge Leonard H. Langen from Glasgow allowed Lance to proceed through a few more of Deschamps' objections. However, he got less and less patient, finally telling Lance, "We're not trying this man."

He then scolded Lance for requiring special treatment, saying he'd been "trying to lean over backwards" because Lance wasn't a lawyer. Lance responded that it was unfair to hold him to the same standards as a member of the bar.

Langen was brought in to hear the case because Missoula's district judges either had schedule conflicts or conflicts with Lance. His most recent lawsuit, filed in December in U.S. District Court in Missoula, alleges a judicial conspiracy deprived him of his land, the right to visit his children a "life, liberty and the pursuit o happiness."

Named as defendants in the suit, which seeks $6 million in damages, are four present and former state district judges, fiv counties, two county sheriffs, t state of Montana, Lance's ex-w her new husband and three cu rent owners of Lance's former ranch

PAUL CARTER/Misso

**One-time Florence rancher John F. Lance prepares to cross-examine a witness Tuesd as he acted as his own attorney in his Missoula District Court trial on charges of felo intimidation.**

# Search for sliced ski sparks s

A recent radio promotion by Missoula station DXT-FM promoted some confusion around town.

The station cut a ski into six chunks, hid each und town and offered on-the-air clues as to the loca- ts. Listeners who found the e parts retur m to the station for

## Reporter's notebook

"I'm now getting calls from distant states are calling just reach the governor of Montan.

Nevertheless, Schwinden

ATE JUDICIARY COMMITTEE
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NO. HB541

PROPOSED AMENDMENTS TO HB 541:

1. Page 1, line 18.
Following: "~~losses~~"
Strike: "SO"

2. Page 1, line 20.
Following: "COSTS,"
Insert: "losses,"

SENATE JUDICIARY COMMITTEE
EXHIBIT NO. 3
DATE 032385
BILL NO. HB 541

# STANDING COMMITTEE REPORT

March 25 19 85

MR. PRESIDENT

We, your committee on JUDICIARY

having had under consideration HOUSE BILL No. 541

third reading copy ( blue color )

(Senator Daniels)

PARTY MULTIPLYING LEGAL PROCEEDINGS LIABLE FOR INCREASED COSTS

Respectfully report as follows: That HOUSE BILL No. 541

be amended as follows:

Page 1, line 18.
Following: "losses"
Strike: "SO"

AND AS AMENDED

BE CONCURRED IN

~~XXXXXX~~

~~XXXXXXXXXX~~

Senator Joe Mazurek Chairman.